# FW&A Comments on the Rate of Return Petition by Western Wireless CC Docket No. 96-45; RM 10822 Attachment 2

2003.10.31 14:44/14 Kansas Corporation Commission 787 Susan K. Duffu

## BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

Before Commissioners:

Brian J. Moline, Chair
John Wine
Robert E. Krehbiel

OCT 3 1 2003

Laur Lifty Docket
Room

In the Matter of GCC License Corporation's
Petition for Designation as an Eligible
Docket No. 99-GCCZ-156-ETC

Telecommunications Carrier.

## STAFF'S REPLY TO WESTERN'S RESPONSE TO MOTION FOR CLARIFICATION AND DETERMINATION IF ETC STATUS SHOULD BE REVOKED

NOW COMES Staff of the Corporation Commission of the State of Kansas (Staff and Commission, respectively) and, for its Reply to the Response of Western Wireless Corporation and WWC License, LLC (Western) to Staff's Motion to Reopen Docket to Clarify Order #11 and to Determine if Western's ETC Designation Should Be Revoked (Staff Motion), states as follows.

#### The Sprint Issue

- 1. As the Commission made abundantly clear in its Orders #6 through #11 in these proceedings, Sprint Telephone Company-Kansas operating areas are rural for federal universal support service purposes. In order to receive such federal support, the carrier requesting ETC designation must offer the supported services throughout the study area of a rural telephone company. 47 U.S.C. 214(e)(1), (5).
- Western was well aware of the federal requirement that the requesting carrier provide the supported services throughout the study area of a rural telephone company:

The Commission can and should make a determination, a public interest determination relative to the Sprint exchanges for purposes of the federal ETC designation. What I was trying to emphasize, however, is that the

grant of ETC status to Western Wireless, assuming you make the public interest determination, cannot be made final until after we do the disaggregation of their study area issue. The federal law for rural telephone companies is competitive ETC is required to serve on a study area basis unless and until the state commission and the FCC determine it's something less that the study area. . .We have indicated in our testimony that we don't have the ability to provide service on a study area basis for Sprint.

Comments of Western's counsel Mark J. Ayotte, Tr. Vol. 1, p. 45 and p. 18 respectively, emphasis added.

- 3. Despite Western's clear understanding that, in accordance with federal law, it was not qualified to obtain federal universal service support in Sprint territory at that time, Western filed its request for the support in Sprint areas with USAC, the administrator of the federal universal service fund, beginning in December of 2000.
- 4. Western has admitted that it received federal universal service support for its customers who reside in Sprint operating areas (Western Response, p. 2). However, Western attempts to brush aside the culpability of its actions, claiming that "receipt of such funds was inadvertent and based on a good faith interpretation of the Commission's Orders." (Western Response, p. 4).
- 5. It is difficult to believe that any interpretation—let alone a "good faith" one—of the Commission's Orders could arrive at the conclusion that Western was qualified to receive federal support payments out of Sprint territory. The Commission repeatedly explained to Western that, for federal considerations, Sprint areas in Kansas are rural: Order #6 ¶ 38, "All wire centers in Kansas served by Sprint Telephone Company are rural wire centers"; Order #7 ¶ 12, "For federal universal service purposes, Sprint Telephone Company-Kansas is considered a rural telephone company"; Order #9 ¶ 6, "In Order #6 the Commission found that Western Wireless qualified for ETC status for the KUSF in Sprint territory, although not for federal USF support."

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6. It is equally difficult to believe that receipt of the funds was "inadvertent",

understanding that Western affirmatively requested the support from USAC. Furthermore,

contrary to Western's claims (Western Response, p. 6), it appears from USAC records that

Western received federal universal service support for Sprint territory on more than "one

occasion".

7. Although this support flow has reportedly been terminated, Staff believes that the

Commission should still be very concerned about a carrier in Kansas which seemingly conducted

itself in contradiction to federal law and Commission orders. Furthermore, Western's casual

dismissal of its actions intimates an abiding disrespect for Commission rules and the law, a

characteristic that is surely not in the public interest.

The Tin Can Theory

8. Western is of the opinion that the Commission is a mere pawn when it comes to

evaluating a carrier's qualifications for ETC purposes:

The Commission's authority is limited to either granting or denying federal ETC status to an ETC applicant. It does not include jurisdiction or authority to approve or reject federal universal service funding for

particular types of service offerings that either qualify or do not qualify

for federal support.

Western Response, p. 8, emphasis added. Taken to its extreme conclusion, Western could string

together a couple of tin cans for a "universal service offering" in Kansas without concern about

the Commission because the Commission lacks "any authority to determine whether a particular

service offering is eligible for federal universal service support." Id.

9. While one might believe that it would be unlikely that Western would build a tin-can

system, it's not that much more unlikely than Western obtaining federal universal service support

out of Sprint operating areas-but, Western did so. Worse, federal support was obtained after

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Western had represented to the Commission that it could not legally do so because it lacked the

"ability to provide service on a study area basis for Sprint."

10. Western's low opinion of the Commission's authority, based upon federal law, is

simply wrong. 47 U.S.C. 214(e)(2) provides the Commission the authority to designate a carrier

as an ETC, provided the carrier offers, and advertises, the services that are supported by federal

universal support mechanisms throughout the service area for which the designation is received.

47 U.S.C. 214(e)(1). Western was quite explicit that its universal service offerings did not

include the services provided by its conventional cellular service:

Q. Western Wireless' universal service offering, does it require, in order to obtain that offering that the customer obtain one of these wireless

access units that sits in front of you?

A. Yes. The universal service offering that Western is proposing requires

this wireless access unit, yes.

Q. So if I want just one of our hand-held, half-watt units, I can't obtain

your universal services?

A. That's right.

. . . .

Q. And I guess one of the things that's been confusing for me all the way through is, so Western Wireless is going to seek funding only for those

customers that have this unit, correct?

A. That's correct.

Q. Not for hand-held phones?

A. That's right.

Tr. Vol. 1, pp. 117 – 118, emphasis added.

11. Western not only testified that its universal service offering was restricted to the

wireless access unit, but, in response to questions from then-Chairman Wine, it also indicated

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that its conventional cellular service could not provide the federally required universal services throughout the designated service areas:

- Q. Oh, I think you just explained that some customers might need a three watt [wireless access unit] to have service but many would not need to have that base unit to have service, a hand-held unit would provide good quality service, but you are not going to permit them to sign up for the universal service?
- A. That's right. The universal service offering, as a result of - we are putting out there as a result of **this designation** would be using this unit, yeah.
- Q. And what I didn't understand is why you were limiting it that way?
- A. This unit ensures that using the same network that's in place today, it ensures that customers throughout the entire designated service area will have coverage. . These guys (indicating [the wireless access units]) pick up and transmit different levels of signal. So, that ensures that a customer in all points of the designated service area has the signal that they need.
- Q. But you are not offering the service to someone who would have the signal strength they need with a hand-held?
- A. That's right.

Tr. Vol. 1, p. 125, May 9, 2000, emphasis added.

- 12. In response to redirect questions the next day, the Western witness tried to disassociate himself from previous testimony that Western was limiting the universal service offering to the wireless access unit. Tr. Vol. 2, p. 206, May 10, 2000. However, even under the friendly skies of redirect, the Western witness again indicated that its conventional cellular service could not serve the federally supported services throughout the designated service areas:
  - Q. So that the record is clear, why is Western Wireless planning to initially provision universal service offerings using the wireless access unit?
  - ...The second reason that we use this unit is, as described yesterday, to serve the entire coverage area.

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Tr. Vol. 2, p. 205. The Commission could not grant ETC status to a CMRS carrier whose system

apparently was incapable of providing the supported services throughout the designated areas.

13. While this Docket presented issues of first impression (Order #2, p. 3), the

Commission was quick to understand the crucial principal issue underlying the designation of a

carrier as an additional ETC. In denying the Petition for Reconsideration of Southwestern Bell

Telephone Company (SWBT) with regard to eligibility of mobile wireless service for universal

service support, the Commission found:

SWBT offers no legal support for its contention that services such as mobile wireless service should not qualify for universal service support and neither state law nor federal law make a distinction between mobile and fixed wireless service. The issue is whether the ETC provides the required services, not the particular technology it uses in

providing them.

Order #7, p. 11, emphasis added. Western believes this finding by the Commission rips the heart

out of Staff's Motion. Western is very mistaken. In fact, this Commission finding succinctly

sets out Staff's position-it's not the carrier; it's not the technology; but, it is the matter whether

Western could provide the supported services throughout the designated areas with its

conventional cellular service. It was Western's testimony that it could not.

14. From the perspective of federal law governing ETC designation, a communications

system that is incapable of providing the supported services throughout the designated areas is no

better qualified for federal support than the tin-can network would be.

15. It is no surprise then that the Commission, based upon the record, clearly limited

Western's ETC designation to the universal services obtained through the wireless loop access

unit:

Consequently, the Commission concludes that, with implementation

of the Western BUS [Basic Universal Service] offering as described

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**by Western in this Docket**, designation of Western as an additional ETC will preserve and enhance universal service at reasonable and affordable rates with high service quality.

Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, October 12, 2001, p. 18, emphasis added (ETC Order).

#### Jurisdiction

16. Western maintains that, in accordance with *In Re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 15, 687 P.2d 603, 615 (1984), the Commission has lost its jurisdiction and authority to grant Staff's Motion because certain rural telephone companies (RLECs) appealed the ETC Order. The *Shawnee* court observed that a trial court lacks jurisdiction to reconsider or change a final judgment upon appeal. The court thought the same rule should apply to administrative boards sitting in a quasi-judicial capacity and held, once an administrative board enters a final order, its jurisdiction to reconsider or change such order is lost after a valid appeal has been perfected. *Id.*, p. 15.

17. Notwithstanding what Western would have the Commission believe, *Shawnee* is clearly not applicable here. The RLECs sought judicial review only of the ETC Order. Petition for Review<sup>1</sup>, p. 4. Staff's Motion did not request either reconsideration or change to this Order. Rather, Staff requested clarification of a provision in Order # 11 and to consider revocation of Western's ETC designation which would be decided in a Show Cause docket, to be established at a later date if the Commission would determine that an investigation is warranted. Western should have read *In re Estate of Robinson*, 232 Kan. 752, 659 P.2d 172 (1983). In *Robinson*, the district court's judgment relative to a will was on appeal. However, eight months into the

Petition for Judicial Review of Final Agency Action (K.S.A. §§ 77-601, 607), Nemaha County District Court, filed January 2, 2002 (Petition for Review).

appeal, the district court held a hearing on attorneys' fees in the case and rendered judgment.

The district court's action didn't even raise an eyebrow in the Kansas Supreme Court:

A trial court does not have jurisdiction to modify a judgment after it has been appealed and the appeal docketed at the appellate level. **However, this rule does not stay other proceedings before the lower court.** As noted in *Fields v. Blue Stem Feed Yards*, 195 Kan. 167, 403 P.2d 796 (1965), reiterating *Carr* at 379: "An appeal to this court does not of itself operate as a stay of further proceedings in the trial court. The filing of a supersedeas bond. . will stay the execution of a final judgment but it does not stay other proceedings in the trial court." 195 Kan. at 170 (Emphasis supplied.).

The district court's order of January 25, 1982, allowing compensation pursuant to K.S.A. 59-1504, did not alter or modify the appealed orders concerning admission of the two wills. Allowance of attorney fees and expenses is a distinct "other proceeding" and, therefore, the trial court had jurisdiction to hear and determine the petition seeking such allowance.

Id., at 754, bold emphasis added. The Shawnee case cited by Western does not contradict the long recognized principle that other proceedings below are valid; rather, it merely stands for the obvious that the Commission cannot reconsider or change an order that has been appealed, until such time as the appeal is finally decided.

#### Summary

Western obtained unlawful federal universal service support in Sprint operating territory.

Western has likewise obtained unlawful federal universal service support for its conventional cellular service. In accordance with well-established law, the Commission, notwithstanding the RLECs' appeal of the ETC Order, has the authority to investigate Western's conduct in the marketplace to determine, as a consequence of Western's actions, if Western's ETC designation should be revoked. Staff believes that Western's conduct has been so egregious as to warrant a Show Cause proceeding. As an alternative, the Commission could order Western to file a case demonstrating that its conventional cellular service meets federal and state universal service

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requirements. The Commission could in that proceeding determine if a refund of support payments associated with Western's conventional cellular service is appropriate. Staff also recommends that the Commission clarify Order #11 to ensure USAC understands that Western is

not eligible for federal universal service support in the Sprint operating areas.

Respectfully submitted,

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Counsel for Staff

#### **VERIFICATION**

STATE OF KANSAS	)	
	)	SS
COUNTY OF SHAWNEE	)	

Robert L. Lehr, being duly sworn upon his oath deposes and says that he is an Assistant General Counsel for the Kansas Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing and believes that the statements made therein are true and correct to the best of his knowledge, information and belief:

Robert L. Lehr

SUBSCRIBED AND SWORN to before me this Alst day of October, 2003.

AMY S. POTTER
Notary Public - State of Kansas
My Appt. Expires 7/7/07

My Appointment Expires:

### CERTIFICATION OF MAILING

(99-GCCZ-156-ETC)

I hereby certify that on this **31st** day of October 2003, I caused a true and correct copy of *Staff's Reply* to be deposited in the United States Mail, postage prepaid, addressed to the following:

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